under a general verdict no one can know how they have distinguished between fact and law. As Lord Mansfield said in the passage I have quoted: 'The distinction is preserved by the honesty of the jury. The constitution trusts, that under the direction of a judge they will not usurp a jurisdiction which is not in their province.' The third is that even in a case in which a verdict of acquittal is such that it can only be contrary to law, nevertheless it is the last word. That is secured by the fact that the common law gives no power to the judge to set it aside; and that the statutory power of setting aside a verdict vested in an appellate court, which is the way whereby the unlawful verdicts of civil juries can be controlled, cannot in a criminal case be invoked at the suit of the prosecution."

It is not out of place now to refer to Article 7(2) of the Constitution which says:—

"A person who has been acquitted or convicted of an offence shall not be tried again for the same offence except where the conviction or acquittal has been quashed and a retrial ordered."

As the law stands, we are of the view that no power to quash an acquittal is permitted and we therefore dismiss the appeal and confirm the order of acquittal by the learned judge. In the light of our decision, it must necessarily follow that the Warrant of Arrest issued pursuant to section 56A must be vacated and we so order.

Appeal dismissed.

Solicitors: *Karpal Singh & Co.*

LAW TIM WAH v. PUBLIC PROSECUTOR

[F.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman and Chang Min Tat F.JJ.) September 6, 1977]

[Kuala Lumpur — Federal Court Criminal Appeal No. 34 of 1977]

Criminal law and Procedure — Appeal — Finding of fact by trial court — Prejudicial evidence admitted as result of cross-examination — Cautioned statement not tendered by prosecution — Discretion of prosecution.

The appellant had been convicted on charges of unlawful possession of a revolver. The learned trial judge was satisfied beyond reasonable doubt that the appellant was seen and chased by the police in the vicinity and that the appellant was armed with a revolver and fired at the police officer and was subsequently arrested. The prosecution did not use the cautioned statement of the appellant.

Held, dismissing the appeal: (1) the appeal court could not interfere with the finding of the fact of the trial judge who saw and heard the witnesses and was in a better position to assess their credibility;

(2) it was alleged that the learned judge had taken into consideration inadmissible and highly prejudicial evidence resulting in a miscarriage of justice but the appellant had no reason to complain of prejudicial evidence when these arose as a result of cross-examination. No substantial miscarriage of justice had occurred;

(3) it was strictly a matter for the prosecution to decide whether to use the cautioned statement or not. If the prosecution considered that the other evidence was sufficiently strong to establish guilt, they were entitled to use their discretion not to introduce the cautioned statement.

Case referred to:-

(1) *Girdari Lall & Ors.* v. *Public Prosecutor* [1946] M.L.J. 87.

FEDERAL COURT.

K. Kumaraendran for the appellant.

Datuk Haji Abdullah bin Ngah (Deputy Public Prosecutor) for the respondent.

Lee Hun Hoe C.J. (Borneo) (delivering the judgment of the Court): We dismissed the appeal and stated we would give our reasons later. We do so now.

On June 22, 1976, acting on information, A.S.P. John Choo Hon (PW2) organised a police party in raiding a place in the vicinity of Sandilands Street Ghaut. When they reached the vicinity they split up into small groups in search of appellant who was a wanted person. D.P.C. Woon Hoi Din (PW3) saw appellant and ordered him to stop. Instead, appellant ran away. As he fled he turned round and fired a shot at PW3 who fired two shots in return. As the chase went on there were further exchanges of shootings. The shots were heard by other police officers. D.P.C. Harun bin Rimin (PW4) who was with Inspector Mahyuddin (PW5) then saw appellant emerging from one of the houses carrying a revolver in his right hand. They gave chase. Appellant ran into a corner and fired a shot hitting PW4's right leg. Appellant ran away and they lost sight of him. Later, they saw that appellant was arrested. The next person to see appellant was Inspector Abdul Rani bin Abdullah (PW6). He shouted at appellant to stop but appellant again fled. Meanwhile, P.C. Soo Ho Wei Kong (PW7) who was off duty and happened to be in the vicinity, saw appellant running out of a lane along Bridge Street. Appellant had a revolver in his right hand. PW7 followed appellant. Then appellant tucked the revolver in his waist. When he was close by, appellant took out his revolver as he was trying to stop a motorist. At that moment PW7 grapped the revolver and the wrist of appellant. There was a scuffle and two shots were fired. PW7 was shot in the arm but managed to disarm appellant and took possession of the revolver. PW6 saw what happened. He came to PW7's assistance and arrested appellant.

Appellant admitted he was in the vicinity but denied he was carrying a revolver and firing at the police officers. He claimed that there was another person. It was that person who actually carried the revolver, fired the shots, threw it down and fled when appellant was apprehended. However, the police officers taking part in the raid claimed to be chasing the appellant who was carrying a revolver. There was never another person.

There were two conflicting stories. The learned judge had to decide which story was true. He saw and heard all the witnesses and was in a better position to assess their credibilities. He stated clearly that he had no reason to doubt the veracity of the prosecution witnesses and that he had no hesitation in rejecting the presence of another person involved in the chase. In other words, he regarded the story of the presence of another person as a figment of appellant's imagination. The facts were clear. The learned judge was satisfied beyond reasonable doubt that appellant was seen and chased by the police in the vicinity and that appellant was armed with a revolver and fired at the police officer and was subsequently arrested. In short, he was sure of appellant's guilt.

Consequently, appellant was convicted on both charges of unlawful possession of a .32 Smith & Wesson Long revolver, contrary to section 57(1)(a) and section 57(1)(b) of the Internal Security Ordinance, 1960 respectively, and sentenced to death. He appealed against both conviction and sentence.

It was alleged that the learned judge admitted and took into consideration inadmissible and highly prejudicial evidence resulting in a miscarriage of justice. This matter must be carefully examined. It is proper to bear in mind that we are not dealing with a jury trial or with a direction to a jury, but with a judge's expression of his views. We do not think it is wrong for the police to use photographs before arrest to assist them in ascertaining the proper person to be arrested, but the photographs should not be tendered in evidence by the prosecution. Thus, in *Girdari Lall and Others* v. *Public Prosecutor*[1] the Court of Appeal quashed the conviction because a police photograph of an accused was put in evidence. We see no reason why counsel for appellant should complain about what he called prejudicial evidence when these arose as a result of cross-examination.

During the trial the learned judge was informed by the learned Deputy Public Prosecutor and the court staff that appellant spat at a prosecution witness. Appellant was asked to apologise but he refused. The learned judge decided to defer taking any action on such contemptuous conduct in the court. But, counsel for appellant submitted that the learned judge should have heard the appellant on the matter, and complained that the learned judge did not inquire further into the matter during the trial. In his written judgment, the learned judge made clear that the appellant's defiance of a court ruling could be the subject of contempt proceedings, but he took no further action on the matter as appellant was facing charges punishable with death. Had the learned judge decided to take cognizance of the offence he would surely give appellant the opportunity to defend himself. The matter did not end there as counsel for appellant alleged that because of the incident the learned judge was prejudiced against appellant. Such serious allegation should not be lightly made. We find no substance in this allegation. The learned judge took pains to explain that he gave no thought to the incident in coming to his decision regarding the guilt of the appellant. We agree with the learned judge that if such kind of conduct should cause a court to halt proceedings and order a new trial, then it would create a serious problem to the administration of justice.

The learned judge rightly rejected the argument that the prosecution should tender the cautioned statement otherwise the presumption under section 114(g) of the Evidence Act would be against prosecution. It is strictly a matter for the prosecution to decide whether to use the cautioned statement or not. If the prosecution consider that the evidence was sufficiently strong to establish guilt, they are entitled to use their discretion not to introduce the cautioned statement. The production of the cautioned statement tends to prolong a trial unnecessarily as invariably its admissibility would be challenged resulting in a trial within a trial. But, the defence could cause the prosecution to introduce it if they consider it would assist the accused. In this case although the defence was aware of the existence of the cautioned statement no step was taken to cause its production.

This is a case where, even if we were to decide the point raised in favour of appellant, on the evidence we find no substantial miscarriage of justice has occurred.

Appeal dismissed.

Solicitors: *Kumar, Chan & Chia.*

LEE WENG SANG v. PUBLIC PROSECUTOR

[F.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman and Chang Min Tat F.JJ.) September 5 and November 11, 1977]

[Kuala Lumpur — Federal Court Criminal Appeal No. 22 of 1977]

Criminal Law and Procedure — Possession of pistol and ammunition — Accused pleading guilty to charge under Firearms (Increased Penalties) Act, 1971 — Appeal against sentence — Retrial ordered — Public Prosecutor applying for committal to High Court on charges under Internal Security Act, 1960 — Cautioned statement by accused — Admissibility of — Judicial notice of proceedings at earlier trial — Admission of accused — Record of proceedings not put in — Criminal Procedure Code (F.M.S. Cap. 6), s. 371(1).

In this case the facts were that a police party raided a room in a house and found the appellant and another Chinese seated in the room. Near them was a packet containing a pistol, ammunition and a hand grenade. The appellant and the other person were originally charged for possession of the pistol and hand grenade and possession of the ammunition but subsequently the charge against the other person was amended to one of being found in the company of the appellant who was in unlawful possession of the pistol and hand grenade. The appellant pleaded guilty before the Special Sessions Court and was sentenced to 7 years and 6 strokes on the first charge and on the second charge to three years. The appellant appealed against the sentence but at the hearing of the appeal the conviction of the appellant was set aside in revision and a retrial was ordered. The appellant was then charged under the same charges but subsequently the Public Prosecutor applied for a committal to the High Court on charges on the same facts under the Internal Security Act, 1960. The appellant claimed trial. At the trial in the High Court, the substantial evidence against the appellant that he was found together with the other Chinese in a room in which were the forbidden articles in question was augmented by evidence of an alleged admission by the appellant (1) that the appellant had while in that room, that is at the moment of arrest or shortly afterwards, admitted that the articles found belonged to him; (2) the evidence of a cautioned statement made on September 18, 1974 and another cautioned statement made on January 23, 1975 (the second occasion being after his conviction in the Special Sessions Court), and (3) the first proceedings in the lower court in its entirety. The appellant was found guilty and sentenced to death. He appealed to the Federal Court.

Held: (1) the Public Prosecutor was entitled under section 371(1) of the Criminal Procedure Code to amend the charges from the Firearms (Increased Penalties) Act to the charges under the Internal Security Act and in any event no appeal was preferred against the decision of the High Court on this point;

(2) although the police witnesses stated at the trial before the High Court that the appellant had admitted that the articles belonged to him, they admitted in cross-examination that they had not said so in the lower court in the trial against the other Chinese. In view of this cross-examination it was the duty of the trial court to consider the differences in the evidence of the police witnesses in the Sessions Court and in the High Court and to come to a finding on the oral evidence before it. The duty of considering the defence or at least this aspect of it, was not discharged in this case;